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JISLY D TABAD & ANOR

v.

SEMON SANDAANG & ANOR

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
STEPHEN CHUNG JC
[ADOPTION APPLICATION NO: K34-20-2009]
7 SEPTEMBER 2010

C ***FAMILY LAW:*** *Children - Adoption - Application for - Child initially adopted by applicants pursuant to native law and customs - Natural parents' application to native court for return of child - Applicants ordered to return child back to natural parents - Whether native court has jurisdiction to decide natural parents' application - Whether welfare of*
D *child is of paramount consideration - Whether child in distress - Factors to consider - Whether applicants' application for adoption in High Court to be allowed - Adoption Ordinance 1960 (Sabah), s. 10*

JURISDICTION: *Native Court - Adoption - Child initially adopted*
E *by applicants pursuant to native law and customs - Natural parents' application to native court for return of child - Applicants ordered to return child back to natural parents - Whether native court has jurisdiction to decide natural parents' application - Whether native court's decision null and void - Native Courts Enactment 1992 (Sabah),*
F *s. 6(1)(c)(ii)*

NATIVE LAW AND CUSTOM: *Family Law - Adoption - Child initially adopted by applicants pursuant to native law and customs - Natural parents' application to native court for return of child - Applicants ordered to return child back to natural parents - Whether*
G *native court has jurisdiction to decide cases involving native law or customs relating to adoption - Whether applicants estopped from denying jurisdiction and power of native court - Native Courts Enactment 1992 (Sabah), s. 6(1)(c)(ii)*

H The applicants filed an application herein to adopt the respondents' ('natural parents') child ('the child') pursuant to s. 10 of the Adoption Ordinance 1960 (Sabah). The child was born on 7 March 2006 and few days later, he was given up for adoption to the applicants. The said adoption was conducted pursuant to
I native customs. Two weeks thereafter, the natural parents requested for the return of the child since they regretted their

initial decision to have given up the child for adoption. Since the applicants failed to return the child, this matter was then referred to the native court at Tamparuli, whereby it was ordered that the child be returned to his natural parents within 30 days. However, the child was only returned two years and three months later. In the application herein, the applicants contended, *inter alia*, (i) that the native court at Tamparuli had no jurisdiction to hear and decide the application made by the natural parents; (ii) that the order of the native court was null, void and of no effect; (iii) that the child had developed a strong bond with them; and (iv) that it would traumatise the child to live in a new and unfamiliar surroundings.

Held (dismissing the application with no order as to costs):

(1) Section 6(1)(c)(ii) of the Native Courts Enactment 1992 (Sabah) ('Enactment') provides that every native court shall exercise original jurisdiction to hear, try, determine and dispose of cases involving native law or customs relating to adoption, guardianship or custody of infants, maintenance of dependants and legitimacy. (para 7)

(1a) The first applicant, the natural parents and the child were natives of Sabah. Hence, the native court at Tamparuli had the jurisdiction and power to hear and determine the adoption and custody of the child under the Enactment. Further, the applicants were estopped from denying the jurisdiction and power of the native court since they had attended the adoption, revocation and custody of the child in the said court. (para 8)

(2) Where there are conflicting claims in an application for adoption, the court is not concerned with the interests of the parties. The paramount consideration is the welfare of the child (*Arumugam s/o Seenivasagam v. Sinnamah*; refd). (para 10)

(3) The social report by the welfare department stated that the child had bonded well with his natural parents and it was also found that he had adjusted well to his new environment. The welfare officer found that the child was active, playful and happy. (para 13)

(4) The child psychiatrist found that the child seemed to be very concerned over his natural mother's emotion whereby upon seeing her crying, the child stopped playing and came forward to comfort her. The child also preferred to seek help from his natural mother when he was stuck with his toys. On the contrary, the child moved away from the second applicant during her session when she was crying while relating her part of the story. (paras 15 & 16)

(5) After nine months of living with his biological family, there was no indication that the child was in distress or traumatised as he was developing in a normal manner both physically and psychologically. Based on the circumstances, including the social report and the psychiatric report, it was for the welfare of the child that he remained with his biological parents and siblings. (paras 17 & 18)

Case(s) referred to:
Arumugam Seenivasagam v. Sinnamah (F) [1959] 1 LNS 7 HC ***(refd)***

Legislation referred to:
Adoption Ordinance 1960 (Sabah), s. 10
Native Courts Enactment 1992 (Sabah), s. 6(1)(c)(ii)

For the applicant - Angela Ubu; M/s Angela Ubu & Assocs
For the respondent - Suzeianah Saulkman; M/s Mahap Jelani & Co

Reported by Kumitha Abd Majid

JUDGMENT

Stephen Chung JC:

[1] This is an application by the applicants to adopt a child pursuant to s. 10 of the Sabah Adoption Ordinance. The natural parents of the child oppose the application and the applicants contend that this is a fit case for the consent of the natural parents to be dispensed with under s. 10 of the Ordinance.

[2] The applicants do not have any child of their own and wish to adopt a child. The natural parents have four other children aged between 13 to 18 years old and agreed to give up the child to the applicants for adoption. The child was born on 7 March

2006 at Hospital Likas, Kota Kinabalu. The child was given up to the applicants for adoption on 11 March 2006 pursuant to native customs. The adoption ceremony was carried out at the natural parents' house at Tamparuli and witnessed by two Ketua Kampong according to native customs. Since then the applicants have raised the child as their own.

[3] The facts showed that the natural parents regretted their decision to give up the child for adoption. They said two weeks after giving up the child for adoption they began to ask for the return of the child. The reasons the natural parents gave up the child to the applicants for adoption were because they were poor and the biological mother was sick at the material time.

[4] They lodged a police report on 26 September 2006 and referred the matter to the native court at Tamparuli. The facts showed that the application was heard in the native court at Tamparuli on 9 January 2007 in the presence of the applicants and natural parents. The court made an order that the child be returned to his natural parents within 30 days and made other consequential orders regarding compensation to the applicants pursuant to native customs. The facts showed that the natural parents had paid the compensation as ordered by the native court but the child was only returned to the natural parents on 17 April 2009.

[5] It was submitted on behalf of the applicants that the native court at Tamparuli had no jurisdiction to hear and decide on the application made by the natural parents for the return of the child. It was submitted that the order of the native court at Tamparuli was beyond its jurisdiction and was null, void and of no effect. It was submitted that the child should therefore be returned to the applicants.

[6] On behalf of the natural parents, it was submitted that in this case, the adoption ceremony was according to native customs and the hearing for the return and custody of the child was also according to native law and customs before the native court at Tamparuli on 9 January 2007. It was submitted that the applicants were estopped from denying the jurisdiction of the native court. Further, it was submitted that the applicants did not appeal against the decision of the native court at Tamparuli to the district native court but had returned the child to the natural parents under the order of the native court at Tamparuli.

[7] The jurisdiction and powers of the native courts in Sabah are set out in s. 6 of the Sabah Native Courts Enactment. Section 6(1)(c)(ii) specifically provides that every native court shall exercise original jurisdiction to hear, try, determine and dispose of cases involving native law or customs relating to adoption, guardianship or custody of infants, maintenance of dependants and legitimacy.

[8] The 1st applicant and the natural parents are natives of Sabah. The child is a native of Sabah. The native court at Tamparuli has the jurisdiction and power to hear and determine the adoption and custody of the child under the Sabah Native Courts Enactments. The applicants and the natural parents having attended the adoption before the Ketua Kampung at Tamparuli and having attended the hearing in the native court at Tamparuli, regarding the adoption, revocation of the adoption and custody of the child according to native law or customs, are estopped from denying the jurisdiction and power of the native court at Tamparuli to adjudicate on the matters in accordance to native law or customs.

[9] The facts showed that the native court at Tamparuli had on 9 January 2007 ordered the applicants to return the child to the care and custody of his natural parents but they did not do so. They only did so on 17 April 2009, about two years and three months later. They had caused unnecessary pains to the natural parents and to themselves by delaying the return of the child.

[10] In an application for adoption where there are conflicting claims, the court is not concerned with the interests of the parties. The paramount consideration is the welfare of the child. I refer to the case of *Arumugam Seenivasagam v. Sinnamah (F)* [1959] 1 LNS 7 which summarised the laws as follows:

1. At common law the parent had, as against other persons generally, an absolute right to the custody of the child, unless he or she had forfeited it by certain sorts of misconduct. Certain statutes have been passed, which did limit to some extent the rights of parent, though not guilty of misconduct that would have disentitled him or her to the custody of the child at common law.

2. The duty of the court is to leave the child alone, unless the court is satisfied that it is for the welfare of the child that some other course shall be taken. The welfare of a child is not to be measured by money only, nor by physical comfort only. The word 'welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.

3. The court has to consider, therefore, the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child so far as it can be said to have any religion, and the happiness of the child. *Prima facie* it would not be for the welfare of a child to be taken away from its natural parent and given over to other people who have not that natural relation to it.

[11] In this case, the applicants are married to each other and live in Sipitang, Sabah. The 1st applicant is a businessman and earns a monthly gross income of RM20,000 whereas the 2nd applicant works as an administration clerk with the Ministry of Education with a monthly income of RM2,300. The applicants in their affidavit said that they have brought up the child as their own and have lavished their love and affection on the child all these years since he was four days old when the child was given to them for adoption. They said that they and the child have developed a strong bond and that to the child they are his parents since he did not know of his natural parents during these years.

[12] During these years, from 11 March 2006 to 17 April 2009 the applicants said that the natural parents did not visit the child, did not show their love for the child and did not provide any support or care for the child. They contended that the natural parents have abdicated their roles and rights as parents to the child. They also contended that the fact that the natural parents had given up the child for adoption showed that they were not fit to be parents of this child.

[13] It was submitted that it would be disruptive and traumatise the child to transplant the child from his familiar surroundings since child birth to live in a new and unfamiliar surroundings and with new people with whom he is not familiar.

[14] Following this application for adoption pursuant to s. 10 of the Ordinance, a social report has been prepared by the Welfare Department dated 17 September 2009. The welfare officer visited the child at the house of the natural parents on 15 September 2009 for the purpose of assessing the child in his new environment. The report stated that the child has bonded and gets on well with his natural parents and siblings as one happy family. The officer found that the child has settled in and adjusted very well to his new environment. During the visit, the officer found the child to be active, playful and talkative and that he was a normal and happy child.

[15] The child was also referred to a consultant child and adolescent psychiatrist at Hospital Mesra, Bukit Padang, Kota Kinabalu for an assessment. The assessments were done on three separate sessions; on 12 January 2010 the child was assessed together with his natural parents and a brother, on 20 January 2010 the child was assessed alone and on 28 January 2010 the child was assessed in the presence of both the natural and adoptive parents, then in the presence of the adoptive parents only.

[16] The child psychiatrist found that the child seemed to be very concerned over his natural mother's emotion when on one occasion, while his mother was relating about their separation, she could not control her emotion and was in tears. Upon seeing her mother crying, the child stopped playing and came forward to hug and comfort her mother.

[17] The child psychiatrist reported that on sessions together with the applicants together with the natural parents, the child was cooperative with all of them together in the room. He sat with the 2nd applicant when she called for him. He seemed to be enjoying the toys brought by the applicants. However the child preferred to seek help from his natural mother when he was stuck with his toys and interestingly when the 2nd applicant was crying when relating her part of the story, the child moved away from her contradicting what happened when his natural matter cried in the previous session.

[18] The report concluded that on the assessment done, that was after nine months of living with his biological family, there was no indication that the child is in distress or traumatised as he was

developing normally both physically and psychologically. There was no report of major behavioral problem like nightmares, bedwettings or behavioural problem: the common presentations when a child was or is in distress.

[19] Having duly considered all the above factors and circumstance including the two reports prepared for the purpose of this application, it is for the welfare of the child that he remains with his biological parents and siblings. Therefore, I dismiss this application for adoption. I make no order as to costs.